

MAURITIAN TRUSTS FOR SOUTH AFRICANS AND OTHER FOREIGNERS

Considering Mauritius As a Suitable Wealth Planning Jurisdiction

By virtue of its close proximity to South Africa, as well as its favourable low tax environment and a healthy network of investment, trade and tax agreements with South Africa's neighbours in Sub-Saharan Africa, as well as India, Asia and parts of Europe, Mauritius has for many years been a popular jurisdiction for South Africans to use for active or passive companies. However, Mauritius has also been adding modern and flexible legislation in areas of financial services and estate planning in order to attract foreigners to use Mauritius as an offshore wealth planning jurisdiction. Mauritius also boasts fiscal advantages of having no exchange controls, a sound banking system, no capital gains tax, a fairly extensive network of Double Taxation Agreements and a relatively simple tax regime. This article will consider Mauritius as a location for establishing a Mauritian trust for general offshore estate planning and wealth accumulation purposes.

The Mauritian government has created various incentives to attract international financial services providers to have a meaningful presence in Mauritius. Investment advisors and fund managers are carefully regulated by modern enabling legislation and a strict financial services licensing system through the Mauritian Financial Services Commission ("FSC") in order to protect the interests of investors. In particular, in Mauritius I have noticed a significant increase in the establishment of various investment advisory, fund management, asset management, venture capital and other financial services concerns, as well as utilizing certain benefits associated with listing on the Stock Exchange of Mauritius, which has resulted in many South African fund management corporates establishing branches in Mauritius, as well as individual skilled financial advisors moving their residency to Mauritius. Whilst South Africa has for years suffered from a "brain drain", the opposite has happened in Mauritius.

Notwithstanding the positive reputation that Mauritius has been building as an international financial centre, it would be remiss for me to avoid mentioning the regrettable "blacklisting" of Mauritius by the European Union ("EU") with effect from 1 October 2020, which remains in force to date. Whilst this is certainly a setback in the course of the furthering the reputation of Mauritius as a credible wealth planning jurisdiction, this blacklisting is transient in nature

and must be put into its proper perspective. Firstly, it should be noted that the blacklisting of Mauritius by the EU was not on account of breach of international taxation practices or any inadequacy with the caliber of its laws. This blacklisting places Mauritius in the EU High Risk Jurisdiction List on account of certain strategic deficiencies in its anti money-laundering and counter financing terrorism regime. The Mauritian government has acted quickly and with great priority in order to address this with a view to being de-listed by the EU as soon as possible, and hopefully before the end of 2021. In the meantime, in my experience the blacklisting has had little to no practical implications for South Africans who have established Mauritian trusts.

Trust Law Differences Between Mauritian and South African Trusts

The trust laws in South Africa are based on a mixture of Roman Dutch and common law rules which in fact create a fair degree of uncertainty and it has often been published by South African trust law experts that most likely the vast majority of South African trusts would successfully be challenged as being invalid by the South African courts for various different reasons. It should be noted that in South Africa there is no enabling legislation that gives clarity as to the laws that govern the validity of a trust and the rights and obligations of the parties involved in a trust. The only specific legislation that deals with trusts is the Trust Property Control Act, No 57 of 1988 ("TPCA") which does not in fact address the legal validity of trusts at all, but rather various largely administrative rules relating to the property held by a trust. The mere fact that a trust is registered by the Master of a High Court does not mean that it is a valid trust, as it is not the Master's responsibility to determine whether the trust complies with South Africa trust law, but only that it complies with the TPCA.

In contrast, in Mauritius trusts have been given legal effect and very clear rules as to its validity, existence and the rights of various parties that have an interest in, control or otherwise transact with a trust in terms of the Trusts Act, No 14 of 2001 ("the Trusts Act"). Comparing South African and Mauritian trust laws, the following distinctions are noteworthy, namely-

- The Trusts Act in Mauritius deems a trust to exist where a person (the trustee) holds or has vested in him property of which he is not the owner in his own right, but with the fiduciary obligation to hold, use, deal or otherwise dispose of such property for the benefit of any person (beneficiaries) whether or not already ascertained or in

existence, alternatively for a defined purpose (including a charitable purpose), and provided that such trust arrangement has been reduced to writing. This means that a simple “declaration” of trust in terms of a deed of declaration by the trustees signed solely by the trustees is sufficient evidence to recognize the creation and existence of a Mauritian trust. In contrast, South African trust law does acknowledge the existence of a verbal trust, but for a trust to come into being there must be the intention, agreement and action on the part of its founder to create a trust by way of gifting an initial asset to be held by trustees in a fiduciary capacity for the benefit of its beneficiaries. A mere declaration of trust by the trustee will not be technically sufficient to evidence the creation of a trust (unlike in Mauritius) and accordingly the founder must evidence a donation of an asset to trustees, and generally it is recommended that this is reduced to writing and signed by both the founder (also known as the first settlor) and the trustees;

- The Trusts Act does not recognize a Mauritian trust if the founder is the sole beneficiary, even if the founder is not a trustee. In contrast, South African trust law will recognize a valid trust where the founder is the sole beneficiary provided that the founder is not the sole trustee;
- The Trusts Act provides for a maximum of four trustees permissible for a Mauritian trust, where at all times one of the trustees must be a “qualified” trustee, which is defined as a licensed Mauritian management company or such other person resident in Mauritius as may be authorised by the FSC to provide trusteeship services. In contrast, in South Africa common law and the TPCA does not prescribe a minimum or maximum number of trustees, although in recent years the Master of the High Court generally prefers a minimum of three trustees with one of them being an independent third party;
- The Trusts Act provides for a maximum period of 99 years for the existence of most trusts, except for a “purpose” trust of a non-charitable nature where the maximum prescribed period is 25 years. In addition, any Mauritian trust that owns Mauritian located immovable property may not accumulate income for a period of more than 25 years. In contrast, South African trust law has no prescribed maximum duration for the existence of a trust.

Unique Features of a Mauritian Law Trust

In addition to the abovementioned distinctions, unique features of a Mauritian trust include the following-

- Whilst the Trusts Act places on the trustees a duty of care and prudence, utmost good faith, to be accountable for any breach of trust, and are not permitted to avoid liability in the event of fraud, dishonesty or gross negligence, the trustees are permitted to apply or otherwise invest trust property without restrictions and without the strict obligation to preserve the trust capital and be accountable for any diminution in its value. This therefore permits the trustees to apply the trust property into alternative or slightly more aggressive investments such as applying the trust property to fund and own a private trading enterprise (usually by way of shareholding in a company), hold wasting assets such as yachts and motor vehicles that depreciate, and trustees are specifically entitled to delegate investment decisions to qualified third parties such as financial advisors and other investment professionals. This is somewhat different to the trust laws applicable in jurisdictions such as Guernsey and Jersey where due to their stricter fiduciary obligations trustees will be hesitant to place the majority of the trust property in what may traditionally be considered to be speculative or otherwise not strictly conservative investments;
- The Trusts Act make provision for a “purpose trust” that exists for a specified objective or purpose and not necessarily to benefit beneficiaries, and in fact there is no necessity to have any beneficiaries of a purpose trust, although this is often necessary if it is appropriate for a Mauritian purpose trust to qualify as a valid trust in accordance with South African law. The position of an “enforcer” is compulsory whose responsibility is to ensure that the purpose of the trusty is carried out. Purpose trusts may be appropriate as special purpose vehicles where the arrangement between the parties concerned, as well as tax planning considerations, favour that participants do not receive beneficial distributions;
- Similar to the trust laws in many tax haven jurisdictions, the Trusts Act provides for the position of a “protector” who may also be the founder and the trustee, whose powers general include the power to remove and appoint trustees, determine the law

applicable to the trust and withhold consent (effectively a negative veto) with respect to specified actions of the trustees, such as amendments to the trust deed and any decision by the trustees to make distributions to beneficiaries. Given that the position of a protector is likely to be viewed by the South African courts as effectively controlling the trust, care should be taken that a South African tax resident person or entity is not a protector of a Mauritian trust, alternatively not the sole protector, failing which the Mauritian trust concerned may well be considered to be a South African tax resident;

- Section 11 of the Trusts Act makes provision for various powerful asset and credit protection provisions. A Mauritian trust shall not be void, voidable or otherwise invalidated in the event of or by reason of the settlor's bankruptcy or liquidation or any action against the settlor at the instance of its creditors, provided that the settlor of the trust at any time that he settles property on the trust did not intend to defraud persons who were creditors of the settlor at that time. In addition, even if a creditor has a claim on the grounds of the actions of the founder being of a fraudulent nature to avoid his creditors, the creditor has a period of only two years from the date of transfer or disposal of assets to the trust in order to have a valid claim against the trustees. Also, notwithstanding any rule of law relating to the enforcement of judgements in Mauritius given by the courts of another jurisdiction, the Mauritian courts are obliged not to recognize the validity of any claim against Mauritian trust property pursuant to the laws or court order of another jurisdiction that relate to the proprietary consequence of marriage or the dissolution of a marriage, succession rights of the founder after his death, as well as claims by creditors in the case of the insolvency of the founder;
- An important peculiarity in the Trusts Act is the right given to beneficiaries, including beneficiaries that may be completely discretionary with no vested rights, to force the trustees to terminate a trust at any time where all of the beneficiaries concerned are in existence, all are of full age and legal capacity and have unanimously agreed to do so. In such a situation the beneficiaries may force the trustees to terminate the trust and the trustees are required to distribute the trust property as the beneficiaries may direct by unanimous agreement. It is therefore very important for the estate planner (usually the founder) to ensure that during her lifetime she is one of the named beneficiaries, and provision is made to appoint an alternative discretionary beneficiary

in the event of the mental or legal incapacity of the founder during her lifetime. Also, where the founder has specific wishes regarding the distribution policy after her death, enforceable arrangements need to be provided for to ensure that this is achieved.

Practical Considerations to Bear in Mind

From a practical perspective, a few points are worth taking into account in the course of the founder's decision-making process to establish a Mauritian trust, namely-

- The Trusts Act and South African tax laws require a leap of faith for the founder to vest control over the trust assets with a licensed Mauritian management company. Choose this service provider carefully by understanding what you require and what the service provider is able to offer, and whether the fees that they charge are appropriate in the circumstances. Also ensure that the objectives of the estate plan are considered by an independent lawyer with sufficient Mauritian trust law experience, as well as a review of the trust deed by an advisor proficient in the trust and tax laws of South Africa, as these expertise are seldom offered by the Mauritian management company;
- Determine whether it is initially appropriate to apply the Trusts Act as the governing law of the trust, and depending on the requirements of the founder the opportunity exists to apply the trust laws of another jurisdiction that may be more appropriate for his or her needs, whilst still having the administration and trustees based in Mauritius, taking advantage of the Mauritian tax benefits and local financial service provider skills that may be necessary to use to show commercial substance in Mauritius when making investment decisions;
- Consider the future plans of the founder and his family who will be beneficiaries of the trust in terms of the place of ultimate residency. If the founder or certain of the beneficiaries intend to move their tax residency to Mauritius, a Mauritian trust will invariably be an excellent choice in terms of the application of the Trusts Act. However, if it is the intention of the beneficiaries to

eventually move their tax residency to say Portugal, then Mauritius is not going to be an appropriate jurisdiction for various reasons;

- Take care to ensure that where possible the trust is formed outside of South Africa. This means that ideally the founder should not be within the borders of South Africa at the time that the trustees communicate to the founder their acceptance of the initial donation into trust. If this is not possible (particularly in current times with travel restrictions), then not doing so is not fatal provided that great care is taken to ensure that all aspects of the administration and decision making of the trust happens strictly in Mauritius and not in South Africa. Also ensure the trust is recognized a trust according to South African law by using a Settlement of Trust deed rather than a Declaration of Trust;
- If the future needs of the founder and his family are to receive beneficial distributions whilst being South African tax residents, ensure that South African tax advice is obtained from the outset so that the trustees are aware of how to account for the growth of the trust fund and make distributions tax efficiently.

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